

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION

<b>IN RE ONLINE DVD RENTAL ANTITRUST LITIGATION</b>	<b>Master File No. 4:09-md-2029 PJH MDL No. 2029 Hon. Phyllis J. Hamilton</b>
<b>This document relates to: ALL ACTIONS</b>	<b>[PROPOSED] REVISED ORDER GRANTING CONDITIONAL CLASS CERTIFICATION AND PRELIMINARY APPROVAL OF PROPOSED SETTLEMENT AND FORM AND PLAN OF NOTICE</b>

1        This matter has come before the Court for (1) certification of a Settlement Class pursuant to the  
 2 terms of a Settlement Agreement dated July 1, 2011 (the “Agreement”); (2) preliminary approval of  
 3 the Settlement; and (3) approval of the Plan of Notice to members of the Settlement Class of the  
 4 Settlement.

5        The Court hereby ORDERS that (1) the Settlement Class is certified for purposes of settlement;  
 6 (2) the Settlement is Preliminarily Approved; and (3) the Plan of Notice is approved.

7        Certification of the claims advanced by the Settlement Class will achieve a definite and certain  
 8 result for the benefit of the Settlement Class and is preferable to continuing litigation in which the  
 9 Settlement Class would necessarily encounter substantial risk, uncertainty, delay, and cost. This Order  
 10 is entered exclusively for this Settlement purpose. Capitalized terms in this Order shall have the same  
 11 meanings as set forth in the Agreement.

12      Preliminarily, this Court finds that the following terms and conditions shall apply to this Order:

13      1.        This Order includes a conditional class certification for Settlement purposes only.  
 14      2.        This Order applies to claims against Defendants Wal-Mart Stores, Inc., Walmart.com,  
 15 USA LLC, and related persons and entities described in the Agreement (collectively, “Wal-Mart”)  
 16 only.

17      3.        The Agreement pursuant to which this Order is entered contains a claims process by  
 18 which members of the Settlement Class may submit a Claim Form to receive a portion of the Gift Card  
 19 Component by way of either a Gift Card or, at the Settlement Class Member’s election, a cash payment  
 20 of equal value instead of a Gift card, as provided for in the Agreement.

21      4.        If for any reason this Court does not finally approve the Agreement, or if the Settlement  
 22 Effective Date as defined in the Agreement does not occur, the conditional certification of the  
 23 Settlement Class shall be deemed null and void without further action by this Court or any of the  
 24 Parties. In such circumstances each Party shall retain all of its respective currently existing rights to  
 25 seek or to object to the certification of this litigation as a class action under Fed. R. Civ. P. 23 or any  
 26 other California State or Federal Rule, statute, law, or provision, and to contest and appeal any grant or  
 27 denial of certification in this litigation or in any other litigation on any other grounds.

1       5.     The Plaintiffs and Wal-Mart have agreed that, other than to effectuate and enforce the  
 2 Settlement of this Litigation as between the Settlement Class Members and Wal-Mart in this  
 3 jurisdiction, the certification of the Settlement Class for settlement purposes and all documents related  
 4 thereto, including the Agreement and all accompanying exhibits and all orders entered by the Court in  
 5 connection with the Agreement, are not intended to be otherwise admissible as evidence in this  
 6 Litigation, and are not intended to be used in any judicial, arbitral, administrative, investigative, or  
 7 other court, tribunal, forum or other proceeding, including any wage and hour or other litigation  
 8 against Wal-Mart.

9       6.     In accordance with the foregoing terms, conditions, and purpose, and in accordance  
 10 with Section 5.1 of the Agreement, this Court ORDERS that the Settlement Class be certified as  
 11 follows:

12       Any person or entity residing in the United States or Puerto Rico that paid a subscription fee to  
 13 rent DVDs online from Netflix on or after May 19, 2005, up to and including [date of Court  
 Order].

14       7.     Named Plaintiffs Bryan Eastman, Amy Latham, Melanie Misciosia Salvi, Stan Magee,  
 15 Michael Orozco, Andrea Resnick, Liza Sivek, Michael Weiner and Scott Caldwell are hereby  
 16 appointed as Class Representatives.

17       8.     The claims certified pursuant to this Order consist of claims arising from the conduct  
 18 referred to in the Litigation or the California State Actions, as those terms are defined in the  
 19 Agreement, irrespective of the particular common law, statutory, or equitable doctrine or theory  
 20 advanced in support of the claim or claims, including Plaintiffs' allegations that persons and entities  
 21 who subscribed to Netflix to rent DVDs between May 19, 2005 and the date of this Order paid higher  
 22 subscription prices due to an alleged illegal anti-competitive agreement between Netflix and Wal-Mart.

23       9.     Pursuant to Rule 23 of the Federal Rules of Civil Procedure, the Court hereby affirms  
 24 Class Counsel's appointment of Craig Corbitt of Zelle Hofmann Voelbel & Mason LLP as  
 25 Independent Settlement Counsel to serve as the lead negotiator of the Agreement on behalf of the  
 26 Settlement Class.

1       10. With respect to the Settlement Class, and solely for the purposes of effectuating the  
 2 Settlement, this Court finds and concludes that the requirements of Fed. R. Civ. P. 23(a) and 23(b)(3)  
 3 are satisfied. The Settlement Class meets the requirements of Rule 23(a) of the Federal Rules of Civil  
 4 Procedure as follows:

- 5           a. Members of the Settlement Class are sufficiently numerous that joinder of all members  
                 would be impracticable.
- 6           b. The claims of the Class Representatives are typical of the claims of the members of the  
                 Settlement Class they represent.
- 7           c. There exist questions of law or fact that are common to the claims of members of the  
                 Settlement Class.
- 8           d. The Class Representatives and Class Counsel will fairly and adequately protect the  
                 interests of the members of the Settlement Class.

9       11. The Settlement Class meets the requirements of Rule 23(b)(3) of the Federal Rules of  
 10 Civil Procedure as follows:

- 11           a. Questions of law or fact common to the claims of the Settlement Class predominate  
                 over any questions affecting only individual members of the Settlement Class.
- 12           b. A class action is superior to other available methods for fairly and efficiently  
                 adjudicating the controversy.

13       12. Upon review of the record and the Agreement, the Court finds that the proposed  
 14 Agreement, under which Wal-Mart has agreed, *inter alia*, to pay \$27,250,000 in cash and cash  
 15 equivalents—which will be used to satisfy, among other things, all timely claims submitted by  
 16 Settlement Class Members, as well as any attorneys' fees, costs, expenses and service awards to the  
 17 Class Representatives that may be sought and awarded and the costs of class notice and claims  
 18 administration—in return for a release of all claims as set forth in the Agreement and dismissal of the  
 19 Litigation against Wal-Mart with prejudice, was arrived at after extensive, arm's length negotiations  
 20 falls within the range of possible approval, particularly in light of the fact that the Agreement does not  
 21

1 settle the claims against Netflix; and is hereby preliminarily approved, subject to further consideration  
 2 at a final fairness hearing to be scheduled at a later time.

3       13. The Court appoints Rust Consulting as Claims Administrator, with responsibility for  
 4 class notice and claims administration. Rust Consulting will be assisted with class notice by its  
 5 subsidiary Kinsella Media.

6       14. The Court finds the form and manner of giving notice to the Settlement Class set forth  
 7 in the declaration of Dr. Shannon Wheatman (the “Wheatman Declaration”) fully satisfies the  
 8 requirements of Rule 23 of the Federal Rules of Civil procedure, the Due Process Clause of the United  
 9 States Constitution, and any and all other applicable laws, constitutes the best notice practicable under  
 10 the circumstances, and shall constitute due and sufficient notice to all persons entitled thereto.

11       15. The Court ORDERS the following schedule:

12           Notice shall be issued expeditiously pursuant to the plan of notice in the Wheatman  
 13 Declaration. The e-mail Notice shall be first e-mailed to Settlement Class Members within thirty (30)  
 14 days following the Claims Administrator’s receipt of the Class List information (or signed agreement  
 15 between Netflix and Plaintiffs regarding Netflix’s dissemination of the notice to the Class and the  
 16 protocol assigned thereto), or within thirty (30) days following the District Court’s preliminary  
 17 approval of the Settlement, whichever is later. Notice by Online and Earned Media—comprising  
 18 banner advertisements and a press release distributed on PR Newswire’s US1 Newsline, as described  
 19 in the Wheatman Declaration—shall begin on the soonest practicable date after the e-mail notice is  
 20 first e-mailed to Settlement Class Members. From the date on which the first e-mail Notice is sent, the  
 21 following deadlines apply:

- 22           o Deadline for fee petition(s) and motion for final approval: 75 days
- 23           o Deadline for opt outs: 90 days
- 24           o Deadline for objections: 90 days
- 25           o Deadline for final approval replies and responses to objections (if any): 104 days
- 26           o Final approval hearing: ~~120 days~~. February 15, 2012 at 9:00 a.m.

1       16. The form and manner of Notice set forth in Wheatman Declaration also shall be applied  
2 to the Netflix Litigation Class (“Litigation Class”) certified on December 23, 2010 (Dkt. 287) and as  
3 amended by the Court’s order of August 29, 2011 (Dkt. 482). There shall be one Joint Notice  
4 disseminated, comprised of notice to the Settlement Class and Litigation Class, described *supra*.

5

6 **IT IS SO ORDERED.**

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8 Dated: 9/2/11

